



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

December 8, 2021

VIA ECF

Honorable Jesse M. Furman
United States District Judge
Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

**Re: *United States v. Joshua Adam Schulte,*
S3 17 Cr. 548 (JMF)**

Dear Judge Furman:

The Government respectfully submits this letter pursuant to the Court's Order dated December 6, 2021 (D.E. 627) directing a response to the defendant's allegations that "the Government is 'recording . . . conversations [during meet and confers] to use against [him] at trial.'" *See also* D.E. 623 at 3.

By order dated September 23, 2021 (D.E. 518), the Court ordered "the parties . . . to schedule and hold a telephone call twice a month to meet and confer about discovery and other issues. The call is to take place at a mutually convenient time during the defendant's regularly scheduled SCIF hours. Present on the call will be the defendant and a member of the Government's trial team. Standby counsel may also join, at the discretion of the defendant and standby counsel." *Id.* at 3. This order was entered at the request of standby counsel. (D.E. 502). Pursuant to this Order, attorneys for the Government have arranged for semi-monthly teleconference calls¹ with the defendant held at pre-arranged times during the defendant's SCIF hours using a pre-arranged teleconference dial-in. One or more attorneys for the Government as well as an FBI agent have participated in these calls for the Government. To date, standby counsel has not participated, but may do so using the teleconference dial-in.

At the outset of the calls, the defendant is informed of the identities of the participants for the Government, that the calls are held pursuant to Court order, that the calls take place over an unclassified line where classified information cannot be discussed or disclosed, and that the calls are recorded. The next call is scheduled for Friday, December 10, 2021.

¹ At times this schedule has been interrupted by SCIF cancellations. We believe these interruptions have been resolved by the Court's November 3, 2021 order (D.E. 575).

Inmate communications are routinely monitored and recorded, and the defendant's communications in particular are subject to rigorous monitoring and recording requirements. As the Court knows, Bureau of Prisons ("BOP") inmates' emails and non-attorney calls are monitored or recorded. *See, e.g.*, BUREAU OF PRISONS, *Stay in Touch* (available at <https://www.bop.gov/inmates/communications.jsp>) (visited December 7, 2021). The defendant's communications are further subject to Special Administrative Measures ("SAMs"), *see* D.E. 127, 485 at 3; 527; that, among other things, provide for his communications with third parties to be monitored, including inspection of incoming and outgoing mail with third parties and the recording of telephone or video calls with third parties. (*See* D.E. 127 at 6; D.E. 92 Ex. F).

While the defendant's calls with members of the Government trial team are not covered by the SAMs monitoring requirements and are not recorded by the BOP because they are placed from the Courthouse SCIF rather than from the detention center as ordered by the Court, they are nonetheless recorded for similar reasons: to preserve a record of conversations between the Government and an unrepresented defendant, to ensure that the defendant does not disclose or discuss classified information in an unclassified setting, and to ensure that attorneys for the Government do not become essential witnesses to any statements of the defendant that might constitute or be evidence of a crime. *Cf.* Rule 3.7(a), New York Rules of Professional Conduct, 22 NYCRR § 1200.00 ("A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact" unless one of five requirements are met.).

The Government intends to continue to hold the semi-monthly calls as directed by the September 23, 2021 order in accordance with the practices described above.

Respectfully submitted,

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cc: Standby counsel (by ECF)
Joshua Adam Schulte (by mail)